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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

W. G. WELLS et al.,

Plaintiffs and Appellants,

v.

RICHARD CIOTTI et al.,

Defendants and Respondents.

B166077

(Los Angeles County
Super. Ct. No. YC041542)

APPEAL from an order of the Superior Court of Los Angeles County.
Lois Anderson Smaltz, Judge. Vacated.

W. G. Wells, in pro. per., and for Plaintiffs and Appellants.

Kerendian & Associates, Shab Kerendian for Defendants and Respondents.

The trial judge failed to make a timely response to a litigant's statement of disqualification. By law, a judge who fails to timely respond to a party's challenge is deemed to have consented to the disqualification. (Code Civ. Proc., § 170.3, subd. (c)(4).)¹ Despite the disqualification by operation of law that occurred here, the case was not reassigned to a different judge. We must now vacate an order entered by the judge after the disqualification took place.

FACTS

Appellants Valuation Systems and its officer W.G. Wells sued respondents Richard Ciotti and Perfetto Sportswear, Inc., for an alleged breach of a commercial lease agreement. Wells, a member of the California bar, acted as attorney for himself and Valuation Systems. The dispute was heard in a bench trial in September 2002.

Before a judgment was rendered, appellants sought to disqualify the trial judge. The court struck appellants' statement of disqualification because appellants' objections to the judge's participation were based solely on Wells's subjective opinions and his dissatisfaction with the court's rulings, which are not lawful grounds for disqualification. Appellants then petitioned for a writ of mandate seeking relief from the order striking their statement of disqualification. Their petition was denied by this Court on October 22, 2002. (Case no. B161996.)² The trial court entered judgment for respondents on November 12, 2002.

On November 22, 2002, appellants demanded a new trial, claiming that they were denied due process because Wells has a hearing impairment that was not adequately remedied during trial. The trial court denied appellants' motion for a new trial, noting that Wells offered no current medical evidence of his claimed hearing disability; that he

¹ All further statutory references are to the Code of Civil Procedure.

² The Supreme Court denied appellants' petition for review.

failed to wear his hearing aids during trial; that a fully functional assisted hearing device was supplied to Wells; and that a loudly amplified microphone system was used at trial.

On January 21, 2003, in response to the denial of his motion for a new trial, Wells filed yet another statement of disqualification with the clerk; the statement was personally served on the trial judge by the sheriff's department on January 27, 2003. On February 11, 2003, the court struck Wells's disqualification statement. The court acknowledged that its response was late, attributing the delay to clerical error.

When appellants initiated their second effort to disqualify the trial judge, respondents simultaneously moved for an award of attorney fees and costs, as the prevailing party in the dispute over the terms of the lease agreement. In March 2003, before the motion for attorney fees was resolved, Wells unsuccessfully attempted to have this case transferred to another judge. The trial court granted respondents' request for attorney fees on March 7, 2003. Appeal is taken from the order granting attorney fees.

DISCUSSION

The appeal is from the order granting attorney fees. A postjudgment order awarding attorney fees is separately appealable. (*R.P. Richards, Inc. v. Chartered Const. Corp.* (2000) 83 Cal.App.4th 146, 158.) The argument raised on appeal is that the attorney fees order is void.

A party seeking to disqualify a judge "may file with the clerk a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge." (§ 170.3, subd. (c)(1).) The verified statement must be served on the judge. (*Ibid.*) Within 10 days, "the judge may file a written verified answer admitting or denying any or all of the allegations contained in the party's statement" (§ 170.3, subd. (c)(3).) "A judge who fails to file a consent or answer within the time allowed shall be deemed to have consented to his or her disqualification and the clerk shall notify the presiding judge or person authorized to appoint a replacement" (§ 170.3, subd. (c)(4).)

A verified statement from a party that discloses no legal grounds for disqualification on its face may be stricken by the trial judge. (§ 170.4, subd. (b); *PBA*,

LLC v. KPOD, Ltd. (2003) 112 Cal.App.4th 965, 972.) An insufficient statement must be stricken, however, within the 10-day period for filing an answer. (*Ibid.*; *Lewis v. Superior Court* (1988) 198 Cal.App.3d 1101, 1104; *Urias v. Harris Farms, Inc.* (1991) 234 Cal.App.3d 415, 420.) If the statement is not stricken in a timely manner, automatic disqualification occurs. (*Urias*, at pp. 420-421.) A disqualified judge has no power to act in any proceeding after his or her disqualification. (§ 170.4, subd. (d).)

Here, the trial judge entered the order awarding attorney fees and costs after automatic disqualification occurred. Through inadvertence, the court had allowed the 10-day period in which to strike the verified statement to lapse. The disqualification statutes do not allow the judge to revive the case by pointing to clerical error. The attorney fees order made after the automatic disqualification was in excess of the court's jurisdiction. (See *Urias v. Harris Farms, Inc.*, *supra.*, 234 Cal.App.3d at p. 424.) We note that Wells did not sit idly by after the automatic disqualification occurred: he affirmatively tried to have the case reassigned to a different judge, but his efforts were rebuffed.

We cannot allow this case to go forward without a note of warning. The statement of disqualification and appellate briefs filed by Mr. Wells are replete with scurrilous accusations directed at the trial judge. Mr. Wells's ad hominem attacks on the court are unbecoming to a member of the State Bar, and we condemn his lack of professionalism.

DISPOSITION

The order awarding attorney fees and costs is vacated. The supervising judge of the superior court, or other person authorized to make case assignments, is directed to assign a new judge to hear and decide respondents' motion for attorney fees and costs and any other postjudgment motions or matters arising in this case after February 6, 2003. The parties to bear their own costs on appeal.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.